SUPREME COURT, U S

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MICHAEL RODAK, JR., CLE

Supreme Court of the United States

October Term, 1974

No. 74-698

Edward F. Dixon,
Petitioner Petitioner,

v.

United States of America,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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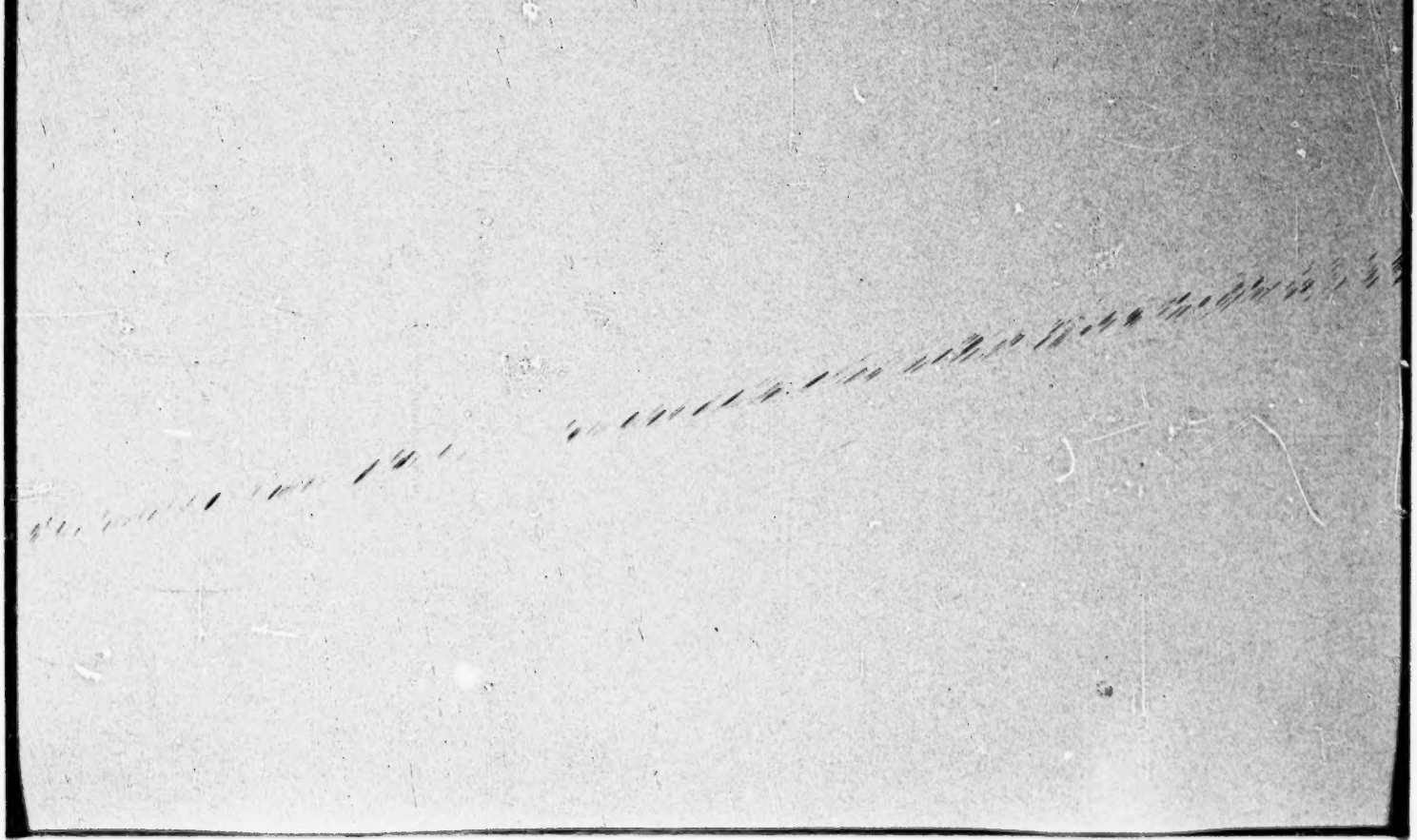
December 4, 1974

BEACON PRINTING - 293-7160 - Washington, D.C. 20036



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THE

Supreme Court of the United States

October Term, 1974

No.

Edward F. Dixon,
Petitioner

v.

United States of America,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on October 3, 1974 and an order denying a petition for rehearing entered November 5, 1974.

OPINIONS BELOW

The memorandum opinion of the District Court for the Eastern District of Pennsylvania was not reported, but is printed at Appendix A hereto.

The opinion of the United States Court of Appeals for the Third Circuit is not yet reported, but is printed in Appendix B hereto.

The denial of the petition for rehearing by the United States Court of Appeals for the Third Circuit is printed at Appendix C hereto.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 3, 1974. A petition for rehearing was denied on November 5, 1974.

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

THE QUESTIONS PRESENTED

1. Whether it is a denial of due process of law to refuse to specifically enforce a "plea bargain", where a United States Attorney, having:

> (a) initiated and participated in "plea bargain" discussions;
> (b) implied during such discussions, that he knows the sentencing proclivities of the district judge in such cases, when given a government report of "cooperation" by the defendant;
> (c) used what he called a standard prosecutor's tactic in order to mislead defense counsel as to the judge's sentencing proclivities; and
> (d) acquiesced in defense counsel's reading (to the district court) of defendant's understanding of the terms of an accomplished plea bargain;

then secretly repudiated the plea bargain by means of an ex parte communication to the district judge but thereafter interrogated the defendant, knowing that he was relying on the existence and terms of the plea bargain as read to the district court and as thereafter sent to the court by defendant's signed letter?

2. Whether it is a denial of due process of law for a defendant to be limited to relief of "withdrawal of plea" even with suppression, where the government will retain substantial benefits from an aborted plea bargain.

STATEMENT

I. *NATURE OF CASE:*

This Petition grows out of an appeal to the Circuit Court of Appeals for the Third Circuit from a district court judgment of conviction and a sentence to a term of imprisonment on a plea of *nolo contendere* and from an order of the district court refusing to vacate the sentence imposed and to specifically enforce a "plea bargain". The Circuit Court of Appeals for the Third Circuit affirmed the district court's refusal and action.

II. *PERSONS INVOLVED:*

THE PETITIONER: Edward F. Dixon, one of three original defendants - and Petitioner here - was the original founder and owner of Dixon Contracting Company, a sole proprietorship, which was subsequently incorporated, in Pennsylvania, as Dixon Contracting Company, Inc. on August 30, 1967.

THE OTHER DEFENDANTS:

A. John P. Dixon, the younger brother of the Petitioner, was general superintendent of Dixon Contracting Company, Inc. from 1968 - 1970 and became President of that Company on January 1, 1970.

B. John L. Dixon, a cousin of Petitioner Edward and Edward's brother, John P. Dixon, was Executive Director of Commonwealth Development Association of Pennsylvania, Inc., a Pennsylvania non-profit corporation at all times at issue.

THE ORIGINAL DEPARTMENT OF JUSTICE ATTORNEY:

Until November 27, 1973, the Department of Justice Attorney in charge of the investigation, and who negotiated the plea bargain, and who supervised the interrogation of the defendants pursuant to that plea bargain, was Raymond E. Makowski.

THE SUCCESSOR DEPARTMENT OF JUSTICE ATTORNEY:

On November 27, 1973, Mr. Makowski was suddenly replaced and succeeded by his superior, Kenneth A. Bravo.

III. *BACKGROUND:*

The facts out of which this case evolved began in 1971. During the summer of that year, the Pennsylvania Crime Commission began an investigation into the affairs of Dixon Contracting Company, Inc. which had had substantial contracts with the Commonwealth of Pennsylvania's Bureau of Mines and Mineral Industries for the extinguishment of culm bank fires. Sometime around the Spring of 1972, the matter was referred to the United States Strike Force in Philadelphia. A federal grand jury was impaneled in approximately May, 1972 to begin an investigation. During 1972 and 1973, the federal grand jury investigation was under the control of the original Department of Justice Attorney, Raymond E. Makowski.

From its inception, by the Pennsylvania Crime Commission, the instant case was based on assumptions of high-level corruption. Indeed, the case was apparently referred to the federal Strike Force by the Pennsylvania Crime Commission with promises of high-level indictments. In early 1973, Mr. Makowski approached Edward Dixon's counsel in an attempt to negotiate an agreement whereby the three Dixons would provide incriminating testimony against certain named highly-placed persons. [The names of these persons have been consistently omitted from the record to protect their reputations.]

The proffered agreement could not be accepted; the Dixons responded that they had no such information.

In September, 1973, Mr. Makowski again approached defense counsel to effectuate an agreement. A discussion was held on Friday, September 21, 1973, between Mr. Makowski and defense counsel. A further conference was held on the following Monday, September 24, 1973, between Mr. Makowski and John L. Dixon (Accompanied by his counsel). Again, Mr. Makowski was advised that the Dixons had no such information.

The indictment was returned two days later, on Wednesday, September 26, 1973.

IV. *THIS CASE:*

This case began with that indictment, charging all three Dixons with income tax evasion and related offenses. The indictment contained 28 counts. Edward Dixon, Petitioner here, was named in counts one through eight.

On the afternoon of October 10, 1973, a Rule 9 conference was conducted by Mr. Makowski, who was then still in charge of the case. In the middle of that conference, Vice President Agnew's plea bargain and sentence suddenly was announced. That set the stage for an exploration of a plea bargain for the three Dixons, initiated by Mr. Makowski.

At that time, Mr. Makowski was specifically advised that the primary interest of the defendants was "no jail time." Mr. Makowski indictated that the primary interest of the government was to obtain "cooperation". He was specifically and carefully advised by defense counsel that the information from the Dixons, for which he was bargaining, would not result in anything major.

The skeleton of what became the actual, final plea bargain was then set:

1. Each defendant would plead "nolo" to one count and the government would move to dismiss the remaining counts;
2. If the Dixons cooperated, the District Court would be informed of that fact and the government would indicate

that it was not recommending jail time; but

3. If the Dixons did not cooperate, the District Court would be strongly urged to impose substantial jail time.

Furthermore, Mr. Makowski threatened further prosecutions, such as "mail fraud", if "cooperation" were not forthcoming. And, *most important*, he then used a specific example of a prior case before Judge Weiner (the *Yanni* case) to underscore the importance of such "cooperation" with respect to the question of "jail time". Mr. Makowski implied that he was familiar with Judge Weiner and that if the defendants cooperated Judge Weiner would not sentence any of them to jail time. Again, he underscored this with a discussion of the *Yanni* case which he had had before Judge Weiner.

The following morning, October 11, 1973, the Dixons were arraigned before the Magistrate. Immediately thereafter, Mr. Makowski and defense counsel met with the district judge. The following occurred:

1. The judge was advised that "no organized crime was involved";

2. The judge asked if the parties "could get together" and was advised that a plea bargain was being discussed, dependent upon "no jail time" and that a plea bargain *would* be made if there were no jail time; he remarked that he was not to "be a party" to any plea bargain; and

3. Enlarged time for filing certain motions was requested and granted.

After the judge left the conference, defense counsel and Mr. Makowski further developed the proposed plea bargain. Defense counsel were advised by Mr. Makowski that he needed approval "from Washington".

Again, Mr. Makowski was specifically and carefully advised by defense counsel that the "cooperation" of the Dixons would not result in anything major. Mr. Makowski responded that that would be the government's risk.

Thereafter, between that date and November 5, 1973, various telephone discussions between Mr. Makowski and

Edward Dixon's counsel resulted in a plea bargain. Accordingly, the court was notified and a second arraignment, before the district court, was set for November 5, 1973. Two of the defense attorneys met with Mr. Makowski beforehand and went over their draft of the plea bargain understanding with Mr. Makowski. Various changes in wording were suggested, not as to content, but as to the Department of Justice's "usual" and "permitted" wording. At the arraignment, the court was immediately advised that a plea bargain had been entered into and a side bar conference was requested. That side bar conference included Mr. Makowski, three defense counsels and the United States Attorney. Mr. Dixon's counsel read his letter draft of the plea bargain to the court at side bar including the penciled changes. Each defendant then entered a plea of *no contendere* to one, carefully selected, count (N.B.: the minimum count as to each defendant, rather than the usual maximum, or broad, count.)

The district court directed the parties to file a written plea bargain, to be signed by the defendants themselves.

That very same day, John P. Dixon, was questioned by Mr. Makowski and Internal Revenue Service agents.

On November 7, the government had complained that the provision in the plea bargain, permitting withholding of information affecting the defendants' civil income tax cases, was being too broadly used in refusing to answer certain questions.

In response, the defendants waived that provision and responded to all grand jury questions, under an agreement that no information would be given to the Internal Revenue Service.

Thereafter, Edward F. Dixon and John L. Dixon were also interviewed at length.

Subsequently, all three Dixons were called before the grand jury and questioned by Mr. Makowski. Overall, all three defendants were questioned and interrogated for many hours - the equivalent of several days.

The bombshell burst on November 27, 1973 when the Dixons appeared before the district court for sentencing.

Suddenly, Department of Justice Attorney, Kenneth A. Bravo entered the scene, obviously totally replacing Mr.

Makowski. As the transcript of the November 27 hearing shows, both the district court and Mr. Dixon's attorney pointedly requested remarks from Mr. Makowski but he sat mute - presumably under instructions to do so.

Mr. Bravo handed to defense counsel a letter, dated that same morning, which, in essence, completely vitiated the plea bargain. Mr. Bravo requested a delay in sentencing. The district court severely admonished the government and directed counsel to get the plea bargain back together.

There was a substantial verbal exchange between Mr. Bravo and the district court with regard to Mr. Bravo's strong objections to the "nolo" pleas, despite Mr. Makowski's earlier advice to the court that the government would only make a token, "pro forma" objection to such pleas, as required by Department Justice policy. (cf. Mr. Makowski's remarks at the November 5, 1973 arraignment before the district court.)

The only prior indications that defense counsel had had that the bargain might be breaking down were:

1. Certain phone calls from the Department of Justice Attorney, indicating "problems" due to pressure from the Internal Revenue Service; and
2. The Department of Justice letter of their version of the plea bargain, dated November 7, 1973 and presumably delivered to the district court at that time, **BUT NOT DELIVERED TO DEFENSE COUNSEL UNTIL FRIDAY, NOVEMBER 23, 1973, AFTER THE DEFENDANTS HAD ENTERED THEIR PLEAS, BEEN INTERROGATED, AND WERE APPEARING BEFORE THE GRAND JURY, AND HAD DELIVERED THEIR PAPERS.**

It was the immediate position of defense counsel that the government was guilty of "bad faith" due to pressure from the Internal Revenue Service. Defense counsel pointed out that the government had been carefully advised that the "cooperation" would not produce anything "big", but that the Internal Revenue Service was apparently exceedingly disappointed, having believed the Pennsylvania Crime Commission promises.

Defense counsel took the position that the entire position of the government had been deliberately fabricated in an effort to maneuver the defense into withdrawal of the pleas. Then, the government would be in the position of saying that the defendants had been the ones to violate the plea bargain, not the government.

The district court specifically asked Mr. Bravo whether the government was withdrawing its understanding of the plea bargain. Mr. Bravo carefully responded that the government was prepared to stand by its understanding of the plea bargain *as contained in the government's letter of November 7.* (emphasis added)

Relying on plea bargaining precedents, defense counsel demanded specific performance of the plea bargain and requested immediate sentencing. The court continued sentencing to January 4, 1974.

On January 4, 1974, the district court again undertook sentencing. This time, Mr. Bravo did the following:

1. He did not inform the court of the hours of interrogation, the defendant's waiver of a protective condition in the plea bargain, their appearances before the grand jury, nor their production of masses of personal documents, all on a waiver of the constitutional privilege against self-incrimination. Instead, contrary to the plea bargain, he informed the court that he was not "convinced" that the defendants had "cooperated" fully.
2. He did not move to dismiss the remaining counts of the indictment. Instead, contrary to the plea bargain, he simply indicated that the government would not object to a defense motion to dismiss.
3. He did not state to the court that the government "did not recommend a jail sentence". Instead, contrary to the plea bargain, he stood mute and refused to take a position. This, of course, was in accordance with the government version of the plea bargain sent to the court on November 7, 1973 without contemporaneous notice to defense counsel.

Edward Dixon was then sentenced to imprisonment, for a term of one year, under 18 U.S.C.A. 4208A2, at Springfield, Missouri and to pay a fine of $10,000.00.

Edward Dixon immediately filed a Motion for Reconsideration of the Sentence (of imprisonment) and moving for specific performance of the plea bargain by imposition of a probationary sentence. The district court ordered a stay of execution of the sentence and ordered an evidentiary hearing to be held on January 29, 1974.

At the evidentiary hearing, held on January 29, 1974, Department of Justice Attorney Raymond E. Makowski testified to the course of the Dixon investigation, indictment, plea bargain, etc. as outlined above.

The hearing was then continued to February 4, 1974.

At the hearing on February 4, 1974 the district court offered to allow the defendants to withdraw their pleas and go to trial. Defense counsel refused the offer and again requested specific performance.

Defense counsel made an offer of proof that defense counsel were specifically told that the government would recommend "no jail time" and that no jail time would result and that they so informed the defendants carefully and specifically. That was stipulated to by the court without putting the witnesses on the stand.

On February 19, 1974, the district court re-sentenced Edward Dixon to imprisonment, for a term of nine (9) months, under 18 U.S.C.A. 4208A2, at Springfield, Missouri, and to pay a fine of $10,000.00.

REASONS FOR GRANTING WRIT

To say that the situation which developed in this case is unfair is to state the obvious. While the Third Circuit Court of Appeals recognized that unfairness, and gave the defendant the option of withdrawing his plea of *nolo contendere*, coupled with suppression of the evidence obtained by the government, that relief was neither fair nor constitutionally adequate.

The mere fact that a given defendant has been treated unfairly may be inconsequential. But, what does have severe

consequences is the fact that the United States Federal Courts have been a party to, and created, that very unfairness.

What has developed in the Circuit Courts of Appeal is not so much inconsistent orders as inconsistent views of precisely what constitutes a "plea bargain" and what the scope of plea bargain enforcement is. This Court should exercise both its supervisory power over the federal courts and its authority, vis-a-vis the United States Constitution, to clarify the situation and specifically define what a "plea bargain" is and determine its role in the criminal justice system. In turn, that would involve the scope of the Rule 11 inquiry. The divergence of approaches in the Circuit Courts of Appeal is a direct result of the present lack of definition and role-determination for plea bargaining.

For example the Third Circuit's opinion in this case makes it apparent that the concept of "plea bargaining" has come loose from its original "due process" moorings, assuming that it had any. See note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. Pa. L. Rev. 865, at 871-878 (1964). Plea bargaining has reverted to a type of commercial contract, measured by the standards of the marketplace, rather than an integral part of the criminal justice system of the United States, meeting the supposedly higher standards of the judicial system: due process. See, Thomas, *Plea Bargaining: The Clash Between Theory and Practice*, 20 Loy. L. Rev. 303 (1974).

It would appear that "plea bargaining" has its roots in the *Kercheval* and *Machibroda* decisions. [*Kercheval v. United States*, 274 U.S. 220, (1927); *Machibroda v. United States*, 368 U.S. 487, (1962)] In *Kercheval*, this Court applied due process standards in holding that guilty pleas should only be accepted by the courts if made voluntarily, with proper advice, and with full understanding of the consequences. Then, in *Machibroda*, this Court extended the *Kercheval* standard of voluntariness, on due process grounds, and held that a guilty plea was not voluntary "if induced by promises or threats."

Taken at its fact value, *Machibroda* could be said to hold that plea bargaining is unconstitutional, as a denial of due process, because it induces guilty pleas by promises and, accord-

ingly, the guilty pleas are not "voluntary". Yet, in both the *Brady* and *Santobello* decisions, this Court seemingly avoided that inherent due process problem. [*Brady v. United States*, 397 U.S. 742, (1970); *Santobello v. New York*, 404 U.S. 257, (1971)] Indeed, *Brady* initiated a judicial trend away from the due process (voluntariness) problem and initiated the application of contract law theories and terms. See comment, *Plea Bargaining Mishaps*, 65 J. Crim. L. & C. 170 (1974). *Santobello*, in failing to establish a constitutional rule, and utilizing only contract terminology and remedies (citing *only Brady*), definitely redirected the attention of the lower courts away from due process and toward a contractual theory.

In the plea bargaining area, this can be seen in the retreat from a true "voluntariness" test. If voluntariness were the test, against a due process standard, then the state of mind of a defendant, in pleading guilty, would be critical. [See e.g., *United States ex rel. Thurmond v. Mancusi*, 275 F. Suppl. 508 (S.D.N.Y. 1967).] Indeed, this Court appears to have so held: *McCarthy v. United States*, 394 U.S. 459, (1969), citing *Heiden v. United States*, 353 F.2d 53 (9th Cir. 1965). Although specifically not reaching the constitutional arguments, as such, 394 U.S. at 464, this Court did point to the due process standard of voluntariness, 394 U.S. at 466, citing *Johnson v. Zerbst*, 304 U.S. 458, 464, (1938).

It is clear that the Circuit Courts of Appeal have substantially departed from, if not abandoned, those due process standards. The decision in *Thurmond*, supra, was specifically overruled as to the subjective test in *United States ex rel. La Fay v. Fritz*, 455 F. 2d 297 (2d. Cir. 1972). Likewise, the subjective test, or state of mind of the defendant, has been disavowed by the Third Circuit: *Masciolc v. United States*, 469 F. 2d 1057 (1972) and *Paradiso v. United States*, 482 F. 2d 409 (1973). Is the rejection of subjectivity a real fear of fraud, or only an excuse, which proper implementation of Rule 11 would obviate?

The Fifth Circuit also rejected the subjective approach, and stated an objective test which was defined as (1) expression

of explicit governmental inducement and (2) reliance thereon by the defendant:

> "Analogous to promissory estoppel, plea bargaining must have more substantiality than mere expectation and hope. It must have explicit expression and reliance and is measured by objective not subjective standards. All of the elements of the plea bargain was found here, and the law gives its sanctions to such bargains when they are real and not mere figments." *Johnson v. Beto,* 466 F. 2d 478 (1972).

Yet, despite the Fifth Circuit's 1972 analogy to "promissory estoppel", by 1974 it is using the Uniform Commercial Code as its source of analogy and rules: *United States v. Owen,* 492 F. 2d 1100 (1974).

The Third Circuit, in this case, ratified the district court's "meeting of the minds" contractual approach and rejected all three estoppel theories offered by the Petitioner. First, the Third Circuit rejected a theory of legal estoppel based on Section 201(b) of the Uniform Commercial Code, a theory which avoided the credibility problems of the subjective test of voluntariness. Second, the Third Circuit also rejected a theory of equitable estoppel based on Section 90 of the Restatement of Contracts: "Promissory Estoppel". Finally, the Third Circuit rejected a theory of estoppel based on due process considerations. Instead, the Third Circuit treated the issue as a factual question only, and stated that it was bound by the district court's finding that there was no plea bargain.

But, the Third Circuit's opinion in this case adds further confusion. Why did the Court order plea bargains placed on the record *"in conjunction with the Rule 11 inquiry?"* The Rule 11 inquiry is designed to develop a record as to the voluntariness of a guilty plea and the factors relevant to that voluntariness. *McCarthy v. United States,* supra. In turn, voluntariness is a due process requirement. *Kercheval,* supra; *Machibroda,* supra. It appears that after adopting a contract theory approach, the Third Circuit had second thoughts and also recognized the due process roots of "plea bargaining".

What is a "plea bargain"? Is it nothing more than a contract between the prosecutor and the defendant (advised by counsel)? If so, how can it involve specific sentencing agreements which are not "the prosecutor's business"? *Shelton v. United States*, 246 F. 2d 571, 572, n.2 (5th Cir. 1957) (en banc) quoted with approval in *Brady*.

The unspecified inter-relationship of non-constitutional, contractual plea bargaining, on the one hand, and the due process of the judicial system is demonstrated clearly in the sentencing area. The question of whether or not to indict, and the question of which counts to press or dismiss, are properly decisions of the prosecutor. Sentencing, however, is strictly within the province of the judiciary. It could be argued, therefore, that no plea bargain can involve, or be induced by, matters involving specific sentencing. Obviously, sentencing is of major interest to a defendant and the courts are aware that plea bargains either include an agreement as to the sentence or are induced by an understanding as to sentence:

> "In order for the practice to have any value to defendants and prosecutors there must be a reasonable expectation of judicial acceptance of the recommendations." 112 Pa. L. Rev. 865, at 866 (1964).

And, in fact, courts have enforced plea bargins which have encroached on the sentencing powers of the judiciary:

1st Circuit:	*Correale v. United States*, 479 F. 2d 944 (1973)
3rd Circuit:	*United States ex rel. Culbreath v. Rundle*, 466 F 2d 730 (1972)
4th Circuit:	*Walters v. Harris*, 460 F. 2d 988 (1972)
5th Circuit:	*Gallegos v. United States*, 466 F. 2d 988 (1972) *Johnson v. Beto*, 466 F. 2d 478 (1972)

9th Circuit: *Macon v. Craven*, 457 F. 2d 343 (1972)

If, on the other hand, plea bargaining is a part of the judicial system itself, then sentencing promises need not be illusory. The prosecutor represents the government and the penalty which the government seeks to impose should be binding if the court accepts the plea. While the court is not, and should not be, a party to the plea bargain negotiations, once a bargain is presented to it and it accepts the guilty plea, then it is bound. The commitment is there between the judicial system and the defendant. See Gallagher, *Judicial Participation in Plea Bargaining: A Search for New Standards*, 9 Harv. Civ. Rights - Civ. Lib. L. Rev. 29 (1974).

The difficulty in this case is that the courts have applied their contractual theories, studiously ignored any reference to "voluntariness", "due process", or the unfair tactics of prosecutors, and the result is obviously unfair. Suppression is worthless on two grounds.

First, tax cases of this type especially, are complicated. It is not so much the evidence itself as the intangible benefits gained from the defendant's interrogation. These intangibles include the meaning and relationships of existing evidence, the ordering of existing evidence into true chronological sequence, and the elimination of spurious and meaningless assumptions and theories which would have otherwise been destroyed, before a jury, at trial.

Second, the original indictment involved three interrelated defendants, none of whom were severed. Two of them were sentenced in accordance with the plea bargain, but could now be forced to testify under the terms of probation, while subject to further indictment in the absence of a plea bargain.

The fundamental question before the Court is the nature of a "plea bargain". Is it some cheap contract, "copping a plea" by hardened criminals, who should be outwitted and outmaneuvered wherever possible? Or, is it a recognized, real part of the criminal justice system requiring the same due process considerations as a trial itself?

CONCLUSION

Since the recognition in *Santobello* of the existence of plea bargaining, the practice has become open. If estimates of the percentage of cases resolved by plea bargaining are correct, the practice is utilized in approximately 90% of all criminal cases. Any practice which affects so high a percentage of criminal cases is clearly a part of the criminal justice system, until and unless barred. Therefore, it *must* be given a "due process" basis or else the vast majority of criminal cases will be resolved outside of the constitutional protections.

Moreover, the "cooperation" of defendants, as used in this case, can be safely elicited by prosecutors and then the intangible benefits of such "cooperation" will be retained. These include the "ordering" of complex factual situations, the interpretation of evidence already available to a prosecutor but not fully understood, etc.. Suppression does not remove such intangible benefits.

Therefore, this Court should issue a writ of certiorari to examine the constitutional basis for plea bargaining.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	: CRIMINAL ACTION
v.	:
EDWARD F. DIXON	: NO. 73-566

MEMORANDUM OPINION

WEINER, J. MARCH 11, 1974

On February 21, 1974 this Court issued an order denying defendant's motion to vacate sentence, for reconsideration of sentence, and for specific performance of "plea bargain". This opinion is written in explanation of that order.

The defendant's allegation in support of the above motion is that the government refused and failed to fulfill its obligations under the terms of a "plea bargain". The government, to the contrary, asserted that it had lived up to its promises under said "plea bargain".

The recorded facts are as follows: On November 5, 1973 the Court entertained a plea of *nolo contendre* wherein the defendant was charged with filing a false and fraudulent corporate income tax return. Fed. R. Crim. P. 11 was fully satisfied before the Court accepted the defendant's plea. During the course of the Court's interrogation of the defendant, his counsel indicated that a "plea bargain" had been effected and respective counsel would by letter clearly define the terms thereof. Thus the seeds of this litigation were planted. Counsel sharply disagreed on one segment of the alleged "plea bargain" and that was the exact recommendation the prosecutor would make to the Court regarding a prison sentence for the defendant. To resolve this issue the Court directed that an evidentiary hearing be held. The testimony elicited during this hearing failed to effectively

demonstrate the conclusiveness of an accomplished "plea bargain". Government's counsel, who was present during the negotiations that preceded the "plea bargain", stated that the government had agreed that it would make no recommendation whatsoever concerning a jail sentence. On the other hand, defense counsel categorically stated that the government had agreed, as part of the "plea bargain", that it would make an affirmative recommendation of no term of imprisonment. We have no reason to disbelieve or dispute the testimony of any of the more than reputable and credible witnesses who appeared in support of their respective positions.

It is our conclusion that there was a complete misunderstanding and that there is more than a reasonable certainty that the defendant plead *nolo contendre* in the sincere belief that the government would suggest to the Court that no term of imprisonment be imposed. In order to cut this Gordian knot, the Court on several occasions advised the defendant that if he desired, he would be permitted to withdraw his plea of *nolo contendre* and thus be permitted to stand trial. The defendant would not accept this suggestion. The Court then sentenced him to a term of imprisonment.[1]

The defendant relies upon the case of *Santobello v. New York*, 404 U.S. 257 (1971) to sustain his request for specific performance of the "plea bargain". We believe that this reliance is misplaced. *Santobello* is not supportive of the defendant's viewpoint for there is no question but that in *Santobello* there was a finalized "plea bargain" which the government disregarded. In the instance case, as previously noted, we have concluded that a "plea bargain" had not been effectuated. We believe it not only improper, but impossible to specifically enforce the terms of a disputed or controversial "plea bargain" when the facts do not warrant a determination of a completed "plea bargain".

We further note that, in our discretion, we unsuccessfully attempted to apply the alternate remedy suggested in the *Santobello* case by granting the defendant the opportunity to

withdraw his plea. He refused and we were impelled to sentence him.

/s/ Charles R. Weiner

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[1] We note that this Court has given a great deal of consideration to the sentencing of this defendant. We firmly believe that all of the atttendant circumstances of this crime warrant a term of imprisonment. Furthermore prior to accepting the plea and throughout the entire sentencing process we emphasized to the parties that we were not bound to follow any "plea bargain" regardless of what its ultimate interpretation might be, nor was the court a party to the "plea bargain".

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1236

UNITED STATES OF AMERICA

v.

EDWARD F. DIXON,
JOHN L. DIXON
JOHN P. DIXON

EDWARD F. DIXON,
Appellant

(D.C. Criminal No. 73-566)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued August 8, 1974

Before SEITZ, *Chief Judge*, ALDISERT and GIBBONS,
Circuit Judges.

Robert D. Peloquin, Esquire
Peloquin, McKeon and Reilly
Washington, D.C.
Paul D. Sulman, Esquire
Philadelphia, Pennsylvania
Richard C. Fox, Esquire
Markowitz, Kagen & Griffith
York, Pennsylvania
Robert M. Taylor, Esquire
Philadelphia, Pennsylvania
Attorneys for appellant

Scott P. Crampton, Ass't. Attorney General
Meyer Rothwacks
John P. Burke
Charles E. Brookhart
Attorneys, Tax Division,
Department of Justice

Of Counsel:
Robert E. J. Curran, U.S. Attorney

OPINION OF THE COURT

(Filed October 3, 1974)

SEITZ, *Chief Judge.*

This is an appeal from the judgment of the district court entered against the defendant, Edward F. Dixon, on February 19, 1974, and from an order of that court, entered on February 21, 1974, refusing to vacate the defendant's sentence or to specifically enforce a plea bargain. The defendant was convicted of attempted evasion of corporate income taxes for the fiscal year ended September 30, 1969, in violation of Section 7206(1) of the Internal Revenue Code of 1954, 26 U.S.C. § 7206(1) (1967).

Both before and after the defendant's indictment on September 26, 1973, negotiations had occurred between the defendant's counsel and the government prosecutor as to a possible disposition of the case. At his arraignment on November 5, 1973, the defendant entered a plea of *nolo contendere* to the seventh count of an eight count indictment. At that time, the district court made the proper inquiry of the defendant under Rule 11 of the Federal Rules of Criminal Procedure, ascertaining that the plea had been made voluntarily and that the defendant understood the nature of the charges against him and the consequences of his plea.

The court also noted that plea bargaining had occurred between the defendant's counsel and the govern-

ment prosecutor, stated that the court would not be bound by any plea bargaining agreement arrived at by the parties, and asked that any such agreement be made part of the record of the case.

No such agreement was ever entered on the record either at the arraignment or thereafter. However, pursuant to the district judge's request, the government submitted a letter dated November 7, 1973, and the defendant's counsel submitted a letter dated November 12, 1973, to the court. Each letter outlined the respective parties' understanding of the plea bargain. Taken together they demonstrated that a complete misunderstanding existed with respect to the role that the government prosecutor would assume in the sentencing proceedings. According to the defendant's version, the prosecutor was to affirmatively recommend "No jail time." According to the government's version, the prosecutor was merely to stand mute when asked, by the district judge, for his recommendations.

The defendant maintains that he did not receive the government's letter until November 23, 1973, and therefore was not informed of this disagreement over a term of the proposed plea bargain until after he had performed his part of what he understood to be the bargain by appearing before and disclosing documents to a grand jury, and by submitting to interrogation by the Internal Revenue Service.

On January 4, 1974, the defendant was sentenced.[1] Because of the continuing controversy over the alleged plea bargain, the district judge conducted a hearing on January 29, 1974, to determine whether the government prosecutor had promised to recommend that the defendant not be imprisoned. In the course of this proceeding, the court offered to allow the defendant to withdraw his plea

1. The defendant was originally sentenced on January 4, 1974, to one year imprisonment and a $10,000 fine. On February 19, 1974, the court vacated this sentence and imposed a new sentence of nine months imprisonment and a $10,000 fine.

of *nolo contendere* and have his case tried before a different judge. The defendant indicated that he would not accept this offer but would instead seek specific performance of the alleged plea bargain.

On February 21, 1974, the district court entered an order denying the defendant's motion to vacate his sentence and for specific performance of the alleged plea bargain. In a memorandum opinion dated March 11, 1974, the court explained this order by stating its conclusions, based on the evidentiary hearing, that the defendant had entered his plea of *nolo contendere* in the sincere belief that the government would recommend that no prison sentence would be imposed, but that specific performance was not possible since a completed plea bargain had never been effectuated.

In the first analysis, it should be noted that the misunderstanding which arose out of the attempt to arrive at a plea bargain in the instant case is exactly the kind of problem which this Court anticipated and attempted to prevent in Paradiso v. United States, 482 F. 2d 409 (3rd Cir. 1973). There we were faced with the appellant's contention that his guilty plea had been induced by the expectation that he would be given concurrent sentences. We noted that other jurisdictions had attempted to insure that such misunderstandings would not often occur by requiring plea bargains or any inducements to a plea to be made a matter of record. We stated:

> We believe that it is appropriate at this time for the district courts of this circuit to take similar prophylactic measures to cope with this problem. In connection with their rule 11 inquiry on a plea of guilty, district judges should in essence inform the defendant that plea bargaining is specifically approved by the court and that he may truthfully inform the court of any plea negotiations 'without the slightest fear of incurring disapproval of the court.' Inquiry should also be made of counsel for the parties as to

> any plea negotiations. Should inquiry reveal the presence of plea negotiations, counsel for the parties should be required to state plainly the terms of record and the defendant should state of record whether he understands them and concurs. The court, of course, is not obligated to accept any recommendation or bargain reached by the parties, and it should so inform the defendant when any bargain is disclosed. Compliance with this procedure should avoid ostensible claims by defendants of unfairness in the guilty plea process and minimize the escalating number of cases complaining of aborted plea bargains, involuntary pleas, or frustrated plea expectations. *Id.* at 413.

We reaffirm our statement in Paradiso. *See also* United States v. Simon Hawthorne, No. 73-2048 (3rd Cir., September 5, 1974). Had the district court in the instant case complied with the procedure outlined in Paradiso, in short, had the court required that the alleged plea bargain between the parties be recited on the record at the arraignment on November 5, 1973, the present controversy would have been avoided. Under our supervisory powers we therefore instruct the district courts of this circuit that they are henceforth required to follow the Paradiso procedure, committing any plea bargain to the record at the time of arraignment in conjunction with the Rule 11 inquiry.

The fact that the alleged plea bargain was not placed on the record in the instant case is in no way determinative of the issue involved in this appeal. With respect to the defendant's request for specific performance of the alleged plea bargain with the government, we are bound by the lower court's determination, set forth in its memorandum opinion of March 11, 1974, that no agreement was ever reached between the parties, since this determination is adequately supported by the evidence. We therefore affirm the district court's refusal to specifically enforce the alleged plea bargain.

Nevertheless, we deem it appropriate under the facts of this case to instruct the lower court to grant the de-

fendant leave to withdraw his plea of *nolo contendere* and stand trial, if he so desires. We say this because at the time he was given this choice in the district court he was confronted with the possibility that he would lose the right to obtain appellate review of the district court's determination that there was no plea bargaining agreement reached between the parties, and because at that time he was given no assurance that the information revealed by him to the Internal Revenue Service and the grand jury in performance of what he sincerely thought to be his obligation under a plea bargaining agreement would not be used against him in a trial on the merits.

We are not unmindful of the defendant's allegation that the information which he disclosed is potentially incriminating and that he ordinarily would have been able to withhold it because of his Fifth Amendment right against self incrimination. We therefore instruct the lower court to issue, upon motion of the defendant, an appropriate order excluding from consideration by the jury all such information disclosed voluntarily by the defendant, and any additional evidence, derived from such information, for which government cannot establish an independent source.

The judgment of the district court will be affirmed subject to the right of the defendant, on prompt application to the district court, to have his plea and sentence vacated.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 74-1236

UNITED STATES OF AMERICA

v.

EDWARD F. DIXON,
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JOHN P. DIXON

EDWARD F. DIXON,
Appellant.

(D. C. Criminal No. 73-566)

SUR PETITION FOR REHEARING

Present: **SEITZ,** *Chief Judge,* **VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS,** and **GARTH,** *Circuit Judges.*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having

asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Collin J. Seitz
Chief Judge

Dated: November 5, 1974